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Equitable Conversion: The Effect of a Hurricane on Real Estate Sales Contracts

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Abstract

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KEYWORDS: hurricane, damage, contracts

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I. INTRODUCTION

In August of 1992, Hurricane Andrew slammed the South Florida coast with winds clocked at over 160 miles per hour.[1] It has been estimated that over 63,000 homes (and many more businesses) were either damaged or destroyed.[2] All types of property were affected; valuable and not-so-valuable; residential and commercial holdings alike. The storm did not discriminate. Property owners incurred damage in more ways than one. Some incurred only slight inconvenience, while others had their homes entirely obliterated. In some cases, the property itself was left undamaged, but the surrounding neighborhood was completely decimated or left somewhat "undesirable."

When the storm hit, a number of these properties were subject to real

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1. MIAMI HERALD, Aug. 30, 1992, at 1A, 32A (citing data released by the National Hurricane Center located in Coral Gables, Florida).

2. *Id.* at 1A (noting that 175,000 to 250,000 people were left homeless).

estate contracts set to close.[3] Do purchasers of these damaged properties have to close despite the damage?[4] Must they pay full purchase price? Can sellers be forced to make repairs before closing, or at least grant the buyer a credit? Can either party get out of the deal?[5]

Some of these issues are just now reaching Florida's courts. While a few cases will no doubt settle, quite often neither buyer nor seller will budge. This means litigation. In many cases, the primary issue will be: who bears the risk of the loss? The answer to that question can be found in contract law and principles of equity.

That law, and those principles, as well as the answers to some of the questions posed above, are contained in this article. First, the basic principals of law and equity are identified and reviewed. These principals are then applied to the unique facts arising in the wake of a storm as destructive as Andrew. Throughout the piece, the author offers suggestions as to how the courts can, and most probably will, resolve these issues. It is hoped that the article will provide courts and litigants with an introduction to the basic issues which arise in these situations and a primer (of sorts) with which to deal with them.

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3. *See, e.g.*, Mike Vogel, *What Happens to a Home Sale Contract When a Hurricane Comes to Town?*, MIAMI REV., Sept. 1, 1992, at 1; Robert Kuntz, *Post Andrew Suits May Be Few, But Varied*, MIAMI REV., Sept. 22, 1992, at 1. The week the hurricane struck, the author's firm had three closings pending. One closing was delayed for several weeks, but eventually closed without further incident; one was mutually rescinded after protracted negotiations; and the third is still left unresolved, among the several cases now pending in South Florida's court system.

4. There is, of course, a preliminary inquiry with respect to the extent of the "damage" incurred. *See, e.g.*, Triple E Dev. Co. v. Floridagold Citrus Corp., 51 So. 2d 435, 439-40 (Fla. 1951) (discussing the extent of damage necessary to be deemed "material").

These issues crystalize in situations where a home has been completely destroyed, and the buyer does not wish to purchase it. But what if the roof has blown off the home, while the structure itself remains intact? What if just the pool or driveway have been damaged? What if a large tree has been uprooted, or other distinctive landscaping has been substantially damaged? What if the property itself was left untouched, but the surrounding neighborhood (or economic market) has been devastated? These situations are obviously more problematic; and no doubt it is these situations where most disputes will arise.

5. It should be noted that these situations all involve serious complications or impediments to closing, and do not deal simply with the reasonable time delays caused by the storm. Indeed, many (if not all) scheduled real estate closings in South Florida experienced some sort of delay that week, primarily due to the inability of third parties (lending institutions, title companies, and attorneys) to cope with the systemic breakdown. During the several weeks after Andrew, many law offices and title companies were off-line. Electricity and phone service was unavailable in many areas, and the courthouses could not record deeds or other documents. It was as if the world of real estate stood still.

II. Hurricane Damage: The Basic Principles of Law

In the event that the buyer and seller of a hurricane damaged property cannot resolve their situation by negotiation, each should be prepared for the resolution a court would most likely impose upon them. Naturally, the starting place for this sort of analysis is based in contract law. Before effecting that analysis, however, it would be advisable to pursue a quick digression through the doctrine of equitable conversion as it applies to real estate contract law.

III. The Doctrine of Equitable Conversion

Put simply, the doctrine of equitable conversion is a legal fiction by which an interest in "realty" is converted into "personalty," or vice versa. In effect, the doctrine implies an equitable exchange of the interests of vendor and vendee, with each new interest remaining freely transferable, freely transmissible, and freely capable of descent.[6] The doctrine is based on the equitable maxim, "equity deems done what ought to be done."[7]

Under the doctrine, when a vendor and purchaser of real property have entered into an executory contract to convey title, the purchaser immediately becomes the "beneficial" owner of the property and the vendor retains only "legal" title—as security for the payment of the purchase price.[8] The

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6. *See generally* 2 Joseph Story, Commentaries on Equity Jurisprudence as Administered in England and America § 1212, at 550 (13th ed. 1988).

7. *See, e.g.*, Cain & Bultman, Inc. v. Miss Sam, Inc., 409 So. 2d 114, 119 (Fla. 5th Dist. Ct. App. 1982) ("A maxim of equity is to the effect that equity treats as being done that which ought to be done. This is sometimes called the 'doctrine of equitable conversion.'") (citing 8A Thompson on Real Property § 4442, at 253 (1963)).

For an enlightening discussion on the maxim, see 1 John Norton Pomeroy, Equity Jurisprudence §§ 363-377 (4th ed. 1918). To explore more generally the doctrine of equitable conversion, see *id.* §§ 1159-1168; 2 Story, *supra* note 6, §§ 1222-1233; 1 Herbert Thorndike Tiffany, The Law of Real Property §§ 296-307 (1939); Anne Connaughton, *Equitable Conversion Bows to Homestead Exemption, Complicating Florida's Homestead Exemption Law*, 18 Stetson L. Rev. 645 (1989); Linda E. Hume, *Real Estate Contracts and the Doctrine of Equitable Conversion in Washington*, 7 U. Puget Sound L. Rev. 233 (1984); Jean Warburton, *The Doctrine of Equitable Conversion—Fact or Fiction*, Conv. & Prop. Law. 415-23 (1986).

In seeking to invoke the doctrine, it is important to determine whether the agreement to convey is specifically enforceable, in order that some form of equitable interest can be found in the taker. *See generally* Ralph E. Boyer, Florida Real Estate Transactions § 34A.23 n.5 (1989), and authorities cited therein.

8. *See, e.g.*, Miami Bond & Mortgage Co. v. Bell, 133 So. 547 (Fla. 1931).

vendor's interest—the right to receive payment—is treated as personalty;[9] the vendee's interest, as realty.[10] Accordingly, when a buyer and seller enter into a binding[11] contract for sale, and the property is damaged before closing, the purchaser will generally bear the risk of loss, and be required to pay the full purchase price, regardless of the extent of the damage.[12]

The doctrine of equitable conversion was first adopted in Florida in *Insurance Co. of North America v. Erickson*.[13] In *Erickson*, the vendor of a building under an executory contract[14] tried to collect from his insurance company when, before conveying title, the building was destroyed by

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9. *See, e.g.*, Richard H. Lee, *The Interests Created by the Installment Land Contract*, 19 U. MIAMI L. REV. 367 (1965); Randy R. Koenders, Annotation, *Risk of Loss by Casualty Pending Contract for Conveyance of Real Property—Modern Cases*, 85 A.L.R.4th 233 (1991), and authorities cited therein; Annotation, *Rights and Liabilities of Parties to Executory Contract for Sale of Land Taken by Eminent Domain*, 27 A.L.R.3d 572, 581-82 (1969) and authorities cited therein. The vendor, as trustee, holds the legal title to the property as security for payment of the purchase price. It is often referred to as "naked legal title." *See* BOYER, *supra* note 7, § 34A.23, at 88. In effect, the vendor is granted an "equitable" lien upon the vendee's "equitable" estate as security for payment of the purchase price according to the terms of the agreement.

For a discussion of the vendor's lien in Florida, see Alabama-Fla. Co. v. Mays, 149 So. 61, 65 (Fla. 1933).

10. The purchaser's interest is regarded as real property. *See* Holbrook v. Betton, 5 Fla. 99 (Fla. 1853); BOYER, *supra* note 7, § 34A.23, at 88; 1 TIFFANY, *supra* note 7, § 301, at 514-15; Connaughton, *supra* note 7, at 657; Hume, *supra* note 7, at 240.

11. If the contract contains conditions, they should be reviewed to determine whether a binding agreement has in fact been reached or whether the contract is actually contingent upon the occurrence of some event, such as the purchaser's procurement of financing.

Similarly, if the purchaser is entitled to have the property inspected and the contract is contingent on a favorable inspection, then the time periods for inspection and approval become extremely critical (i.e., were inspections and approvals completed *before*, or *after*, the property incurred the damaged in question?). *See* BOYER *supra* note 7, and discussion therein; *see also* discussion *infra* notes 41-42.

12. *See, e.g.*, Koenders, *supra* note 9, and authorities cited therein; Huxford v. United States, 299 F. Supp. 218, 222 (N.D. Fla. 1969) ("[U]nder binding executory contracts for the sale of land, where the purchaser is regarded as equitable owner, the purchaser must ordinarily bear any loss that occurs.") (citing Insurance Co. of N. Am. v. Erickson, 39 So. 495 (Fla. 1905)).

This simple analysis does not, of course, take into account the exceptions to the doctrine, discussed *infra* at notes 42-48, nor does it reflect any contractual modification, also discussed *infra* at notes 49-58.

13. 39 So. 495 (Fla. 1905).

14. The opinion contains much discussion as to the exact nature of the contract for sale, but the characteristics the court focused on most were that of mutuality and equity; that the contract could be mutually enforced in equity between the parties. *Id.* at 497.

fire.[15]

The opinion centers around a typical provision in the insurance policy which served to void coverage in the event the insured ceased to be the "sole unconditional owner" of the insured property.[16] The insurer argued that by entering into the contract for sale, the vendor was not the "owner" of the property, and thus the policy was void.[17] The trial court agreed with the vendor, and The Florida Supreme Court reversed.

As stated by Justice Taylor:

> The interest of a purchaser of property, which he has unqualifiedly agreed to buy and which the former owner has absolutely contracted to sell to him upon definite terms, is the sole and unconditional ownership within the true meaning of the ordinary clause upon that subject in insurance policies, because the vendor may compel the vendee to pay for the property and to suffer any loss that occurs.[18]

The court held that upon execution of the contract to convey, the purchaser became the sole and unconditional owner of the building. As such, the seller could not collect under the express terms of the insurance policy.[19]

Since then, a number of Florida cases have dealt with the doctrine in more than a few different contexts.[20] Ultimately, however, the doctrine has

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15. *Id.*

16. *Id.* at 495-96.

17. *Id.* at 496.

18. *Erickson*, 39 So. at 498 (quoting Phoenix Ins. Co. v. Kerr, 129 F. 723, 726 (8th Cir. 1904)).

It should be pointed out that both *Erickson* and *Kerr* deal only with the concept of equitable ownership within the narrow context of insurability. In light of this distinction, it might be argued that the doctrine was not necessarily intended to shift the risk of loss for casualty damage to the purchaser. There is language in both of these opinions, however, to counter such an argument. *See Kerr*, 129 F. at 726 ("[T]he vendor can compel the purchaser to pay for the property notwithstanding its injury or destruction, and hence suffer the loss occasioned thereby.") (citations omitted); *Erickson*, 39 So. at 498 (quoting *Kerr*). These courts seem to be relying more on the vendor's right to specific performance, rather than on the doctrine itself, to establish the risk of loss rule.

19. *Erickson*, 39 So. at 498.

20. In the years that followed, a number of Florida cases discussed the equitable principles first enunciated in *Erickson*. Fifteen years after *Erickson*, in Felt v. Morse, 85 So. 656 (Fla. 1920), the court held that the loss occasioned by the destruction of a citrus grove from freezing fell on the purchaser of the land, the loss having occurred before the purchase price was paid and legal title conveyed. *See also* Miami Bond & Mortgage Co. v. Bell, 133 So. 547, 548 (Fla. 1931) (same context; citing *Aycock*); Aycock Bros. Lumber Co. v. First

been most often utilized to apportion the "risk of loss" which attends the typical pre-closing time frame.

Perhaps one of the clearest statements of the doctrine in Florida jurisprudence can be found in *O'Neal v. Commercial Assurance Co. of America*.[21] In *O'Neal*, the seller[22] of a home entered into an oral con-

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Nat'l Bank, 45 So. 501 (Fla. 1907) (discussing the vendor's lien rights).

The issue reached the Florida Supreme Court at least two more times in Michaels v. Albert Pick & Co., 30 So. 2d 498, 500 (Fla. 1947), and Hull v. Maryland Casualty Co., 79 So. 2d 517, 518 (Fla. 1954). In *Michaels*, the court merely cited to *Aycock* and reiterated the common law rule. In *Hull*, the doctrine is mentioned generically in an opinion issued upon denial of rehearing. The court restated the rule set forth in *Michaels*, in clear, unequivocal terms: "By ordinary common-law principles, the doctrine of equitable conversion becomes operative upon entry of an agreement to convey title to realty. The vendee immediately becomes the beneficial owner, and the vendor retains only naked legal title as security for payment of the purchase price." *Hull*, 79 So. 2d at 518; *see also* Waldorff Ins. & Bonding v. Eglin Nat'l Bank, 453 So. 2d 1383 (Fla. 1st Dist. Ct. App. 1984) (discussing the effects of the doctrine on the priority of liens); H & L Land Co. v. Warner, 258 So. 2d 293, 295 (Fla. 2d Dist. Ct. App. 1972) ("If a land contract is specifically enforceable, and is free of equitable imperfections, the vendee becomes the equitable owner of the land and the vendor holds legal title as security for the vendee's performance."); Sweet v. First Nat'l Bank, 254 So. 2d 562, 563 (Fla. 2d Dist. Ct. App. 1971) (discussing the descent of the vendor's interest as personalty); McNeill v. McNeill, 135 So. 2d 785, 788 (Fla. 1st Dist. Ct. App. 1961) (applying the doctrine to allocate fire insurance proceeds between buyer and seller); Tingle v. Hornsby, 111 So. 2d 274, 276 (Fla. 1st Dist. Ct. App. 1959) (citing to *Aycock* and *Hull* for the general rules of equitable conversion).

For an interesting discussion on the history and development of the doctrine of equitable conversion in Florida, see Arko Enter. v. Wood, 185 So. 2d 734, 736-39 (Fla. 1st Dist. Ct. App. 1966) and the related annotation, V. Woerner, Annotation, *Rights and Liabilities of Parties to Executory Contract for Sale of Land Taken by Eminent Domain*, 27 A.L.R.3d 572 (1966).

In *Arko*, the subject property had been condemned prior to closing. The buyer sued for return of the deposit; the seller sued for specific performance. *Arko*, 185 So. 2d at 736. After a lengthy discussion of the equitable conversion doctrine, the court held than when parties enter into a binding contract for the sale of improved property, the purchaser is entitled to any enhancement in value or loss incurred. *Id.* at 738.

In addition, the *Arko* court enumerated six characteristics of the purchaser's interest in such cases: 1) it is subject to sale on execution; 2) it may be mortgaged or made subject to trust; 3) it will sustain a claim for homestead; 4) it can descend by testate or intestate; 5) it entitles the purchaser to damages for trespass; and 6) it requires the purchaser to bear any losses due to fortuitous events. *Id.* at 737-38.

The dissent in *Arko* (by then Chief Judge Rawls) raises the interesting question of whether the doctrine should apply in *all* cases in which a contract for sale has been executed. *Id.* at 743.

21. 263 So. 2d 246 (Fla. 3d Dist. Ct. App. 1972).

22. It should be noted that the seller in *O'Neal* had acquired the property through a

tract to convey title under an installment contract. Upon contracting, the purchaser applied for, and procured, a homeowner's insurance policy. On her application, the purchaser represented herself as the owner of the property. After paying several installments, the home was destroyed by fire, and the purchaser made a claim under the policy. The insurance company denied the claim, pointing to the purchaser's misrepresentation as to her ownership of the property.[23] The trial court found in favor of the purchaser/insured, and the insurance company appealed.[24]

On appeal, the insurer claimed that the purchaser had no insurable interest in the property. Florida's Third District Court of Appeal disagreed and affirmed the decision of the trial court. The court held that the purchaser did in fact have an insurable interest in the property by virtue of the doctrine of equitable conversion, and as such, was entitled to recover on the policy, but only to the extent of her equity in the property.[25] As Judge Carroll stated:

> When a contract has been made for the sale of improved property the risk of loss thereof (such as from fire) is upon the vendee, in the absence of an agreement by the parties that it shall be otherwise. By reason thereof, where there is a sale contract which is binding and enforceable, the vendee will be obligated to pay the purchase price provided for in the contract, notwithstanding the improvements should be damaged or lost by fire or otherwise.[26]

A bit more recently, Florida's Fourth District Court of Appeal reached a similar result in *J.C. Penney Co. v. Koff*.[27] In *Koff*, the J.C. Penney company had entered into a written contract to sell vacant land located in the city of Lauderdale Lakes, Florida.[28] At the time of the contract, the property was zoned "R-4A," a classification which permitted up to twenty-eight condominium units per acre.[29] Prior to closing however, the City revised its "R-4A" classification so as to permit only twelve condominium

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foreclosure sale, and that the purchaser was in fact the foreclosed mortgagor. *Id.* at 246.

23. *Id.*

24. *Id.*

25. Since the contract to purchase was not in writing, and was within the statute of frauds, the trial court correctly determined that the purchaser's insurable interest could not be permitted to exceed the amount she had paid under the oral contract. *Id.* at 247.

26. *O'Neal*, 263 So. 2d at 247.

27. 345 So. 2d 732 (Fla. 4th Dist. Ct. App. 1977).

28. *Id.* at 734.

29. *Id.*

units per acre.[30] Naturally, this change had the effect of making the venture less profitable to Mr. Koff. Before closing, Koff sent a notice of recision to J.C. Penney, relying on the fact that the zoning had been changed.[31]

J.C. Penney filed a complaint for specific performance and damages.[32] Koff answered, objecting to J.C. Penney's right to specific performance and demanding the return of his deposit.[33] The trial court denied J.C. Penney's request for specific performance and damages, rescinded the contract, and ordered that Koff's deposit be returned.[34] J.C. Penney appealed.

At trial, Koff had tried to establish an ambiguity in the contract so that he would be permitted to present parol evidence of his intention not to be bound to any adverse change in zoning density.[35] After a lengthy discussion interpreting the express language of the contract, the district court dismissed Koff's arguments about the ambiguities, and went on to imply the existence of an equitable conversion "provision" in the contract.[36]

The *Koff* court held that upon execution of the contract, the purchaser acquired the beneficial title to the property, and thus, became the proper recipient of any subsequent government action.[37] If the zoning density had been increased, or the property had otherwise become more valuable, the purchaser would have been enriched.[38] Conversely, however, if the property value diminished due to the reduction in zoning density, then it is the purchaser who must suffer the detrimental effect. The court reversed the decision of the trial court and remanded with directions to enter an order for specific performance on behalf of J.C. Penney.[39] Consequently, Mr. Koff was obligated to pay J.C. Penney the full contract price.[40]

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30. *Id.*
31. *Id.*
32. *Koff*, 345 So. 2d at 734.
33. Mr. Koff also requested reimbursement for monies he had expended on a collateral agreement with the City of Oakland Park, Florida. *Id.*
34. The court also ordered the return of $55,000 the purchaser had paid on a collateral agreement with the City. *Id.*
35. *Id.*
36. *Id.* at 736. The court concluded that the contract language was not ambiguous, and that extrinsic evidence should not have been admitted to change or alter its express terms. *Koff*, 345 So. 2d at 736.
37. *Id.* The *Koff* court quoted from Hull v. Maryland Casualty Co., 79 So. 2d 517 (Fla. 1954), and discussed Arko Enter. v. Wood, 185 So. 2d 734 (Fla. 1st Dist. Ct. App. 1966) at some length. *Koff*, 345 So. 2d at 736.
38. *Id.* at 736.
39. *Id.* at 736-37.
40. *Id.*

In sum, when a buyer and seller have entered into a contract for sale, the purchaser will generally be required to pay full purchase price, regardless of the extent of any damage caused by hurricane (or other similar calamity). There are several exceptions to the doctrine, however, and (as mentioned previously) its harsher effects can be offset by contractual agreement.[41] Each of these techniques for avoiding the doctrine and its effects will be discussed in turn.

IV. Exceptions to the Doctrine of Equitable Conversion

As previously mentioned, there may be some situations in which the doctrine of equitable conversion simply may not apply. Obviously, if there is a unsatisfied contingency in the contract for sale, or if the seller has failed to perform in some way,[42] then the doctrine may not be applicable.[43] The key, as stated in *Erickson*, is whether the contract to convey is enforceable in equity.[44] Therefore, any court contemplating conversion must first consider the underlying principles of contract law before invoking the doctrine.

Similarly, in light of the equitable nature of the doctrine, it might very well be possible to convince a court that the facts of a particular case do not warrant conversion. As a creature of equity, the doctrine does not exist as

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41. In fact, many form contracts used in the South Florida area contain provisions which address these very issues. Alas, while many so-called "standard contracts" do in fact contain such provisions, many do not. Others fail to shift the risk equitably or do so without proper regard for the circumstances. This is particularly true in form contracts utilized by developers whose contracts are often one-sided, and which specifically place the "risk of loss" on the purchaser regardless of the extent of damage. Each individual contract must be scrutinized in order to determine the extent of protection offered each party.

42. It should be noted that contingencies in real estate contracts typically favor the purchaser, and do not generally impair the purchaser's right to specific performance. For example, despite the seller's failure to produce appropriate evidence of title, or the purchaser's failure to obtain proper financing (two of the more common contract contingencies), the purchaser would still normally have the right to pursue specific performance by waiving those conditions. This might be significant in light of the emphasis some courts place on the purchaser's right to specific performance in these cases. *See, e.g.*, BOYER, *supra* note 7, and discussion therein.

43. As the court outlined the elements of the doctrine in *Erickson*, "[t]he interest of a purchaser of property, which he has *unqualifiedly agreed* to buy and which the former owner has *absolutely contracted* to sell to him upon definite terms . . . ." 39 So. at 498 (emphasis added).

44. *Id.* at 497.

a right, and perhaps should not be applied in all circumstances.[45] This would certainly seem appropriate in cases where the loss incurred is too great, or beyond the contemplation of the parties, or if the vendor comes into court with unclean hands. As such, the fundamental principles of equity, and the facts of each particular case should be scrutinized in order to question the doctrine's application.

There is also a significant question (at least in Florida), as to whether the doctrine of equitable conversion would apply to damage incurred by homestead[46] real property. In fact, in *Estate of Skuro*,[47] the Supreme Court of Florida specifically held that the doctrine of equitable conversion *does not* apply to homestead real property.[48] While this opinion does not directly link the doctrine to the potential risk of casualty loss arising prior to conveyance of title, the broadly worded holding of the case provides ample authority for an argument to that effect. It should be consulted.

V. SHIFTING THE RISK OF LOSS BY MUTUAL AGREEMENT

As discussed, unless the purchase and sale agreement provides

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45. *See Arko*, 185 So. 2d at 741-43 (Rawls, C.J., dissenting). Judge Rawls' dissent makes a convincing argument that the doctrine was not intended to apply in all circumstances.

46. A comprehensive discussion of the term "homestead" is beyond the scope of this article. For a thorough treatment of the subject within this particular context, see Connaughton, *supra* note 7, at 652-53.

47. 487 So. 2d 1065 (Fla. 1986).

48. In *Skuro*, the personal representative of a deceased homeseller (who died before conveyance of title) petitioned the court to establish the non-homestead status of the property, arguing that the contract for sale—by the doctrine of equitable conversion—had destroyed the homestead character of the property. Estate of Skuro, 467 So. 2d 1098 (Fla. 4th Dist. Ct. App. 1985). In spite of this argument, and in light of the fact that the deceased homeseller had resided on the property until death, the probate court determined that the property was in fact homestead, and that the contract for sale did not destroy that status. *Id.* at 1100-01. As such, the probate court ordered the property set aside as homestead, and the personal representative appealed. Florida's Fourth District Court of Appeal affirmed. *Id.* In addition, the district court certified the following question to the state supreme court:

DOES THE DOCTRINE OF EQUITABLE CONVERSION APPLY TO CONTRACTS FOR SALE OF HOMESTEAD REAL PROPERTY?

Id. at 1101. The Florida Supreme Court answered the certified question in the negative, and went on to hold that "the doctrine of equitable conversion . . . [is] inapplicable when the potential vendor is physically residing on the property as his home at the time of his death." *Id.* at 1066. For a comprehensive treatment of the *Skuro* decision, see Connaughton, *supra* note 7.

otherwise, the risk of loss due to casualty will normally fall on the purchaser. As mentioned in *O'Neal*,[49] however, parties to a purchase and sale agreement can (and often *do*) alter the risk of loss rules which result from the doctrine of equitable doctrine and the remedy of specific performance. The results achieved by these risk of loss provisions vary; very often they are not the work of skilled legal draftsmen, but are instead the scribblings of a harried real estate agent, or worse, the parties themselves. Some provisions do more harm than good.

Nowadays, form contracts are used extensively in most areas of the country. Some of these forms contain provisions which address the issues at hand, while others do not. Many of these forms take dissimilar approaches. One form may contain extremely detailed, complex and interrelated provisions concerning risk of loss,[50] insurance,[51] and mainte-

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49. 263 So. 2d at 247 ("in the absence of an agreement by the parties that it shall be otherwise").

50. A typical risk of loss provision will serve to shift some of the casualty risk off the purchaser, and it will do so using one of the following methods: 1) by requiring the seller to repair or rebuild the damaged property; 2) by granting the purchaser a limited right of cancellation; or 3) by allowing the purchaser some form of credit at closing. It should be noted that while most contractual risk of loss provisions do generally contain at least one (or more) of these terms, there is no standard risk of loss provision in use today, and the parameters of these provisions do vary considerably. Each should be analyzed on its own merit. *See generally* FRANK TADDEO, JR., REPRESENTING THE RESIDENTIAL REAL ESTATE CLIENT 55 (1987) (discussing the Uniform Vendor and Purchaser Risk Act (U.V.P.R.A.) which generally places the risk of loss on the seller pending transfer of either possession or title to the buyer).

51. A typical insurance provision will require one party, or both, to maintain insurance on the property. While a comprehensive discussion of insurance law is beyond the scope of this article, it should be noted that whichever party has the burden of procuring insurance (if any), the party seeking coverage must in fact possess an insurable interest in the subject property. With respect to the purchaser, it now seems clear that when the parties have entered into a binding contract for sale of improved property, the purchaser should be regarded as owner for purposes of insurance protection. As such, the purchaser thus possesses an insurable interest commensurate with the value of the improvement to be insured. *See O'Neal*, 263 So. 2d at 247; Insurance Co. of N. Am. v. Erickson, 39 So. 495, 497-98 (Fla. 1905). In any event, the policy language itself should always be consulted before that conclusion is presumed correct.

Relatedly, a seller who is required to carry insurance during the pre-closing period should review the policy to ascertain whether the current coverage lapses upon sale or disposition of the subject property, whether the amount of coverage is adequate, and whether the sales contract should contain some provision for disbursement of proceeds and participation in same. The contract should also specify whether the seller is obligated to utilize the insurance proceeds to rebuild, or must assign those benefits to the purchaser on demand. *See generally* 30 FLA. JUR. 2D *Insurance* §§ 598-601 & n.34 (1981) (citing as an

nance.[52] Another may set out only basic rights. For this reason, it is important to carefully examine the language contained in the subject provision in order to determine the extent of shift from the doctrine, and the relative rights of the parties with respect to cancellation or reimbursement.[53]

For example, on the form created and approved by the Florida Bar and the Florida Association of Realtors,[54] Standard "O" (governing "risk of loss") reads:

> If the Property is damaged by fire or other casualty before closing and cost of restoration does not exceed 3% of the assessed valuation of the Property so damaged, cost of restoration shall be an obligation of the

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example, an insurance provision contained in National Ben Franklin Fire Ins. Co. v. Gasparilla Realty Corp., 123 So. 736, 736 (1929)). See also Standard "N" of the "Contract for Sale and Purchase" developed and approved by the Florida Bar and the Florida Association of Realtors (commonly referred to as the "FAR-BAR" form) and the FAR/BAR CONTRACT PREPARATION MANUAL Standard N (1988). It is in widespread use in South Florida.

52. A typical maintenance provision will place the duty to maintain the property (in some agreed-upon condition) upon one party, most commonly the seller. In the absence of an insurance or risk of loss provision, this duty might provide the underpinning for an argument that the obligated party repair or restore the property before closing. If the contract contains language which specifically addresses the circumstance of casualty loss, however, that provision would most probably control. *But see* Spindler v. Kushner, 284 So. 2d 481, 483-84 (Fla. 3d Dist. Ct. App. 1973) (discussed *infra* note 57).

53. *See, e.g.*, Triple E Dev. Co. v. Floridagold Citrus Corp., 51 So. 2d 435 (Fla. 1951). In this case, the parties entered into a contract to sell a citrus grove. *Id.* at 436. The contract provided that the risk of loss was essentially on the seller, and it gave the purchaser the right to cancel in the event the property incurred substantial or material damage as a result of hurricane or other calamity. *Id.*

On August 26, 1949, prior to closing, a hurricane passed through the area and destroyed 162,000 boxes of fruit then on the trees. The seller filed suit requesting an interpretation of the parties' rights under the contract. The trial court dismissed the suit, and the seller filed a petition for interlocutory certiorari. *Id.* at 438. The Florida Supreme Court quashed the order of dismissal. *Id.* at 440.

Not surprisingly, the court utilized general rules of contract construction to determine the intention of the parties. It focused on the requirement in the contract that the damage be "material" or "substantial" before the purchaser's right to cancel would arise. *Triple E. Dev.*, 51 So. 2d at 439. The court concluded that a proper finding of materiality would require a determination as to the relative value of the damaged fruit. *Id.* The opinion contains a special concurrence by one justice, and a dissent by two others. *Id.* at 440-41. The case illustrates the difficulty in reaching consensus regarding the parties' intentions under these circumstances and the necessity for the effective drafting of these provisions.

54. See discussion concerning the "FAR-BAR" form, *supra* note 51.

> Seller and closing shall proceed pursuant to the terms of Contract with restoration costs escrowed at closing. If the cost of restoration exceeds 3% of the assessed valuation of the improvements so damaged, Buyer shall the option of either taking Property as is, together with either the 3% or any insurance proceeds payable by virtue of such loss or damage, or of cancelling this Contract and receiving return of deposit(s).[55]

This provision generally places the "risk of loss" on the seller. Thus, the seller has the affirmative obligation to repair or restore the property, provided the cost of doing so does not exceed three percent of the "assessed valuation" of the damaged property. If the cost of repair is greater than the three percent ceiling, the buyer has the right to cancel the contract.

It should be noted, however, that Standard "N" of that same contract requires the seller to warrant the satisfactory condition of the property as late as ten days before closing.[56] It also obligates the seller to maintain the property—including the lawn and shrubbery—through closing.[57] It might be argued that this provision conflicts with, or perhaps even controls, the "risk of loss provision" contained in Standard "O." A court, however, would most likely rule that the specificity of the "risk of loss" provision constitutes an expression of the parties intention that it control in circumstances where

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55. FAR-BAR CONTRACT FOR SALE AND PURCHASE Standard O (1991). Other local contracts contain similar provisions which (up to a certain amount) offer the seller the opportunity to repair the damage within a given time frame (typically 60 - 90 days) while granting the purchaser the right to cancel if the property is not restored within that time. Julie Garton-Good, *Hurricane Damage May Enable Sellers to Void Deal*, MIAMI HERALD, Sept. 11, 1992, at 1H.

56. FAR/BAR, *supra* note 51 (Standard N).

57. Standard "N" of the FAR/BAR form also requires the seller to pay up to three percent of the purchase price for necessary repairs. *Id.* It is interesting to note that this Standard, unlike Standard "O," is tied to the *purchase price* of the property. Standard "O" is tied to the *assessed valuation* of the damaged improvements. *Id.* It would also appear that the two provisions, in dealing with two separate sets of circumstances, might provide a cumulative limitation on the seller's obligation to repair and the buyer's right to cancel.

In any event, it is easy to see how the interplay between maintenance, insurance, and risk of loss provisions can provide significant complications to a reviewing court. For example, in Spindler v. Kushner, 284 So. 2d 481 (Fla. 3d Dist. Ct. App. 1973), the court was faced with a "maintenance" provision which placed the duty to maintain on the purchaser, and a "risk of loss" provision which placed all risk on the seller. While not deciding the issue, the court clearly indicated that the maintenance provision *could* be reasonably read so as to alter the effect of the provision governing risk of loss. The appellate court left the ultimate construction of the contract to the trial court. However, the opinion underscores the importance that all appropriate provisions in the contract be studied before a proper evaluation of the situation can be made.

a "fire or other casualty" has damaged the property—although such rulings cannot be predicted with absolute certainty.

Finally, it should also be pointed out that these provisions typically refer only to damage caused to the "property" or the "premises."[58] Under such limiting terminology, only those items legally considered "property" will give rise to a duty to restore or a right to cancel. It is clear that damage to structures, driveways, landscaping, pools and the like come within the scope of such terminology.

Not every loss of value is covered by this sort of language, however. Most obviously, such terminology does not squarely address the situation in which the "property" has been left relatively undamaged, although the surrounding neighborhood has been destroyed; a common experience after a major hurricane like Andrew. In these situations, the purchaser may very well be obligated to complete the purchase as planned—or forfeit the deposit.

VI. CONCLUSION

This article is intended to provide judges and litigants with direction for conveyance and contract issues raised in the wake of Hurricane Andrew. In sum, anyone seeking to evaluate a real estate purchase delayed or abandoned due to damage from the hurricane must possess a thorough understanding of the applicable law (and the doctrine of equitable conversion), must painstakingly review the contract language involved, and must review the facts of the particular case for the most favorable inferences.

Naturally, the first place to start will be the terms of the contract itself. If the purchaser was represented by counsel during contract negotiations, the contract will most probably contain a provision which specifically governs the relative rights of the parties in the event of pre-closing casualty damage. However, in the event that it does not, the doctrine of equitable conversion may control. A sympathetic court and principles of fairness will undoubtedly play a significant role in these cases; however, the language of the contract and the doctrine of equitable conversion will most likely govern the outcome.

58. *See, e.g.*, FAR/BAR CONTRACT PREPARATION MANUAL Standard O (1988); FAR-BAR CONTRACT FOR SALE AND PURCHASE Standard O (1991) ("If *the Property* is damaged by fire or other casualty before closing . . . .") (emphasis added).